

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

SEP 15 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

PETER MASSINGA,

Appellant.

2 CA-CR 2007-0083

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20052209

Honorable Barbara Sattler, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan

Tucson
Attorneys for Appellee

Emily Danies

Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Peter Massinga was convicted after a jury trial of second-degree murder, attempted first-degree murder, and three counts of aggravated assault. The trial court sentenced him to a combination of consecutive and concurrent, presumptive terms of imprisonment totaling thirty-four years. On appeal, he argues the court erred in failing to strike a juror for cause and in instructing the jury on reasonable doubt. He also contends prosecutorial misconduct requires reversal of his convictions. For the following reasons, we affirm.

¶2 We view all evidence in the light most favorable to sustaining the verdicts. *State v. Boggs*, 218 Ariz. 325, n.1, 185 P.3d 111, 115 n.1 (2008). In May 2005, two men began fighting at the basketball court of a local gym. Massinga and several other men became involved in the altercation. Eventually, Massinga fired several shots from a handgun he was carrying. The bullets struck three men: one in the leg, another in the hand and chest, and the third in the neck. The third victim died of blood loss within minutes. Several witnesses identified Massinga as the shooter, and a Pima County Grand Jury indicted him on the five charges of which he was convicted.

Juror Bias

¶3 Massinga first argues the trial court erred when it denied his motion to remove a juror for cause. At the end of the second day of trial, the juror had informed the bailiff she had seen a bracelet on Massinga's wrist. She inquired whether its purpose was to prevent Massinga from escaping from custody or monitor his probation. The bailiff responded that

she had not seen the bracelet but suggested Massinga may have been wearing it for medical purposes. No other jurors were present during the conversation. After the bailiff informed the court of the juror's comments, Massinga moved to strike the juror and also asked "to have her brought in . . . to find out if she made any comments to any other jurors regarding what she saw or didn't see, when she saw it, and if there was any[]more to it."

¶4 The court did ask the juror whether she had spoken to any other jurors about the bracelet, and the juror replied that she had only asked the bailiff about it. Further, the juror stated that no other juror had mentioned anything about the bracelet to her. The trial court instructed her not to speak about the matter to the other jurors. Finally, the court asked the juror if she could "set aside [her] curiosity about that bracelet and any speculation [she] might have about what it means and decide the case based on the evidence [she] hear[d] in the court and not [on] seeing that bracelet." The juror replied that she could, and the trial proceeded.

¶5 Massinga argues the juror should have been removed pursuant to Rule 18.4(b), Ariz. R. Crim. P. That rule provides: "When there is reasonable ground to believe that a juror cannot render a fair and impartial verdict, the court, on its own initiative, or on motion of any party, shall excuse the juror from service in the case." *Id.* "Excusing jurors is within the sound discretion of the trial court, and its actions will not be disturbed absent 'a clear and prejudicial abuse of that discretion.'" *State v. Lujan*, 184 Ariz. 556, 560, 911 P.2d 562, 566 (App. 1995), *quoting State v. Arnett*, 119 Ariz. 38, 50, 579 P.2d 542, 554 (1978).

“Trial courts have considerable discretion to determine whether juror misconduct requires a mistrial or other corrective action, and the trial court’s decision will not be overturned absent a clear abuse of that discretion.” *State v. Apodaca*, 166 Ariz. 274, 276-77, 801 P.2d 1177, 1179-80 (App. 1990). And, “the party asserting that the trial court erred in denying a motion to strike a juror for cause has the burden of establishing that the juror is incapable of rendering a fair and impartial verdict.” *State v. Davis*, 137 Ariz. 551, 559, 672 P.2d 480, 488 (App. 1983).

¶6 A court is not required to remove a juror who ultimately avows that she can render a fair and impartial verdict based only on the evidence presented. *See State v. Trostle*, 191 Ariz. 4, 13, 951 P.2d 869, 878 (1997) (court’s refusal to strike juror who had looked up employment record of defendant, who had once worked at juror’s place of employment, was not abuse of discretion where juror assured court she had not discussed trial with supervisor nor formed opinion about case and court determined she could be fair); *State v. Lavers*, 168 Ariz. 376, 390, 814 P.2d 333, 347 (1991) (no abuse of discretion in refusing to strike for cause juror who had seen television report about case but stated “he felt he could decide the case based solely upon the evidence admitted at trial”); *State v. Hummer*, 184 Ariz. 603, 605, 609, 911 P.2d 609, 611, 615 (App. 1995) (in prosecution for sexual conduct with four children, no error in refusing to strike juror who ultimately stated she would base verdict on evidence, “not on the quantity of charges and victims”); *Davis*, 137 Ariz. at 559, 672 P.2d at 488 (no abuse of discretion to refuse to strike juror who

expressed displeasure about type of case but ultimately assured court he could be fair and impartial). And, the trial court was in the best position to determine whether the juror could be fair and impartial. *See State v. Smith*, 182 Ariz. 113, 115, 893 P.2d 764, 766 (App. 1995) (“What the juror actually conveyed in the moment of speaking is so dependent on demeanor and intonation as to be inaccessible to a reviewing court. Thus, this is a paradigm case for deference to the trial judge, who had the opportunity to see and hear her speak.”).

¶7 Nor has Massinga shown that the juror in question was incapable of rendering a fair and impartial verdict simply because she saw and may have formed some ideas about a bracelet Massinga was apparently wearing during trial. *See State v. Clabourne*, 142 Ariz. 335, 344, 690 P.2d 54, 63 (1984) (even a juror with “certain opinions or preconceived ideas” may decide a case “if he is willing to put his opinions aside and weigh the evidence as the law requires”); *cf. State v. Blackman*, 201 Ariz. 527, ¶ 12, 38 P.3d 1192, 1198 (App. 2002) (cause to dismiss juror “may be shown by demonstrated bias or prejudice that renders the juror unable to listen to and evaluate the evidence presented”). Because the trial court properly instructed the juror to set aside her knowledge of Massinga’s bracelet when deliberating, because the juror avowed that she could do so, and because we defer to the trial court’s assessment of her demeanor in making that avowal, we find no abuse of discretion in the court’s denial of Massinga’s motion to strike the juror for cause.

Prosecutorial Misconduct

¶8 Massinga next argues that prosecutorial misconduct during closing argument requires us to reverse his conviction. We “review each alleged incident [of misconduct] to determine if error occurred.” *State v. Roque*, 213 Ariz. 193, ¶ 154, 141 P.3d 368, 403 (2006). Even if the acts “do not individually warrant reversal,” we will nonetheless reverse a conviction due to prosecutorial misconduct when “the cumulative effect of the alleged acts of misconduct ‘shows that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant.’” *State v. Bocharski*, ___ Ariz. ___, ¶ 74, 189 P.3d 403, 418-19 (2008), *quoting Roque*, 213 Ariz. 193, ¶ 155, 141 P.3d at 403; *accord State v. Hughes*, 193 Ariz. 72, ¶¶ 25-26, 969 P.2d 1184, 1190-91 (1998).

¶9 Massinga complains about two of the prosecutor’s statements during closing argument. At one point during the state’s summation, the prosecutor observed: “The issue is credibility . . . who is a credible witness. The defendant is not.” Massinga objected, arguing, “[T]hat’s contrary to the instructions.” The judge implicitly sustained the objection and immediately instructed the jury:

[I]f you hear anything that either counsel says that you believe is contrary to either the evidence or the instructions, please remember that you’re the trier of the fact and your recollection of the evidence is what counts, and the law that you’ve been given is what you need to follow.

The prosecutor continued his argument, stating:

What the instructions say is that every witness is a credible witness. What the instructions also say is you

determine the credibility of witnesses. You have to give the defendant the same level playing field when he takes the stand as everybody else. But you make no mistake about this, you decide who is telling the truth and who isn't.

¶10 We conclude the initial remark assailing Massinga's credibility was a permissible argument. *See Portuondo v. Agard*, 529 U.S. 61, 69 (2000) (stating "longstanding rule" that credibility of defendant who takes witness stand "'may be impeached and his testimony assailed like that of any other witness'"), *quoting Brown v. United States*, 356 U.S. 148, 154 (1958); *see also Perry v. Leeke*, 488 U.S. 272, 282 (1989) (when defendant testifies at trial, "rules that serve the truth-seeking function of the trial" apply equally to him as to other witnesses). Counsel are given considerable latitude during closing argument, "includ[ing] the drawing of reasonable inferences from the evidence." *State v. Landrum*, 112 Ariz. 555, 560, 544 P.2d 664, 669 (1976). The prosecutor's contention that Massinga was not a credible witness falls within this realm.

¶11 Massinga also argues the prosecutor committed misconduct when he argued in closing that "[r]eal self-defense . . . is a man who is in his home, a woman in her home asleep, hears glass breaking down the hall" Massinga objected to the statement as "improper argument," and the trial court correctly sustained the objection. The prosecutor then continued his argument, explaining that, because Massinga had testified that he wished he had not brought the gun to the gym, his had not been a case of "real self-defense."

¶12 Although we agree that the prosecutor's first statement about "real self-defense" was arguably a misleading characterization of the law, the trial court sustained

Massinga's objection to those comments. And, before closing argument, the court instructed the jury to disregard any of the lawyers' questions to which an objection had been sustained. The court also correctly instructed the jury on the elements of self-defense.

¶13 Because we presume jurors follow a court's instructions, *State v. Swoopes*, 216 Ariz. 390, ¶ 43, 166 P.3d 945, 958-59 (App. 2007), we must assume the jurors disregarded the challenged statements here and applied the law of self-defense as given to them by the court. Massinga has not otherwise shown how the statements would have affected the verdicts. See *Landrum*, 112 Ariz. at 561, 544 P.2d at 670 (any prejudice created by counsel's statements was cured by court's instructions to jury). And, because we have found only one instance of arguable misconduct, there is no issue here of "persistent and pervasive misconduct" under the cumulative-effect doctrine. *Bocharski*, ___ Ariz. ___, ¶¶ 74-75, 189 P.3d at 418-19, quoting *Roque*, 213 Ariz. 193, ¶ 155, 141 P.3d at 403.

***Portillo* Instruction**

¶14 Finally, Massinga argues the reasonable doubt instruction the court gave pursuant to *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), violated his constitutional rights by effectively lowering the state's burden of proof. Our supreme court has repeatedly rejected similar challenges to the *Portillo* instruction. See, e.g., *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006); *State v. Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003); *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003); *State v. Van Adams*, 194 Ariz. 408, ¶¶ 29-30, 984 P.2d 16, 25-26 (1999). We are bound to follow our

supreme court's decisions. *State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003). Accordingly, we reject this argument without further discussion.

Disposition

¶15 Finding no error, we affirm Massinga's convictions and sentences.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge